

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Review of the Commission's Broadcast) MM Docket No. 98-204
and Cable Equal Employment Opportunity)
Rules and Policies)

TO THE COMMISSION

**COMMENTS OF EEO SUPPORTERS IN RESPONSE TO
THE THIRD NOTICE OF PROPOSED RULEMAKING**

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TABLE OF CONTENTS

	Page
Introduction and Summary	1
I. Background	1
II. The Commission Lacks Authority To Deny Parttime2 Workers The Full Protection Of The EEO Regulations	
III. The Extent Of Parttime Employment	5
IV. The Significance of Parttime Employment	8
V. Whether EEO Practices Should Be Observed For Both Fulltime And Parttime Positions	9
VI. The Minimum Number Of Hours For A Parttime Employee	11
Conclusion	11
Annex 1: List of EEO Supporters	
Annex 2: Statement of Thomas R. Carpenter, National Director for News and Broadcast, American Federation of Television and Radio Artists (AFTRA)	

Introduction and Summary

The organizations listed in Annex 1 below (collectively, the “EEO Supporters”) respectfully submit these Comments in response to the Third NPRM in this proceeding, FCC 02-303, p. 57, ¶182.1/

The Third NPRM seeks the following information:

1. the number and types of positions in the broadcast and MVPD industries which are parttime (less than 30 hours per week);
2. the significance of parttime positions for entry into broadcasting;
3. whether compliance with the recruitment, record-keeping, and reporting requirements for parttime positions would be excessively time-consuming, and in light of this, whether the requirements applicable to parttime positions should be the same as those applicable to fulltime positions; and
4. whether the Commission should set a minimum number of hours for a parttime position to be covered by the rules, and if so, what that minimum should be.

As discussed below, parttime broadcast and cable employment is fundamental to any meaningful effort to provide equal employment opportunity. Parttime employment is a primary entry route for minorities and women. Since the marginal cost of including parttime employees in recruitment and recordkeeping programs is minimal, there is no reason to allow broadcasters to afford less than 100% equal opportunity to parttime workers.

I. Background

Parttime employment was covered by the 1971-1998 regulations, although it seldom figured in EEO adjudications. Parttime

1/ The views expressed herein are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each of their officers, directors or members.

minority and female employment was often invoked in mitigation by broadcasters criticized for employing few minorities and women fulltime.^{2/} However, after Lutheran Church,^{3/} no consideration is given to regulatee employment profiles. Thus, the only remaining issue regarding parttime employment is whether regulatees should recruit broadly for parttime positions and verify these recruitment efforts. The answer should be an unequivocal yes.

II. The Commission Lacks Authority To Deny Parttime Workers The Full Protection Of The EEO Regulations

Denying EEO protection to parttime workers would violate the Act, as well as being irrational and indefensible.

Parttime workers enjoyed full FCC EEO protection for 30 years. The Commission's original EEO rules applied both to fulltime and parttime employees. See Petition for Rulemaking to Require Broadcast Licensees To Show Nondiscrimination in their Employment Practices (R&O), 18 FCC2d 240, 252 (1969) (requiring reporting of "permanent, temporary, and part-time" employees). The original rules required broadcasters to report fulltime and parttime employees separately. Petition for Rulemaking to Require Broadcast Licensees To Show Nondiscrimination in their Employment Practices (R&O), 32 FCC2d 430, 440-41 (1970). In 1987, the

^{2/} See, e.g., WFSQ(FM), 7 FCC Rcd 6056, 6046 ¶8 (1992); Century Broadcasting Corp., 40 RR2d 1019 (1977). However, parttime employment was seldom, if ever, used by the Commission as an aggravating factor to show noncompliance with the recruitment obligations. See, e.g., Radio Chattanooga, Inc., 7 FCC Rcd 2929 (1992), recon. denied, 10 FCC Rcd 9773, 9774 ¶8 (1995).

^{3/} Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998).

Commission rejected a proposal to allow broadcasters to combine fulltime and parttime employees on Form 395, recognizing that “part-time employees generally constitute a significant portion of the total workforce at most broadcast stations.” Equal Employment Opportunity in the Broadcast Radio and Television Services (R&O), 2 FCC Rcd 3967, 3970 ¶21 (1987) (“1987 EEO R&O”).

These rules and procedures were in effect in 1992, when Congress adopted Section 334 of the Act. Section 334 requires the Commission to “continue applying to television broadcasters and cablecasters the EEO Rule that was in effect on September 1, 1992.” Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, 2343 n. 59 (“2000 EEO R&O”), recon. denied, 15 FCC Rcd 22548 (2000), reversed in part on other grounds sub nom. Maryland/DC/Delaware Broadcasters Ass’n. v. FCC, 236 F.3d 13, petitions for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied, 534 U.S. 1113 (2002).^{4/} There has been no suggestion that the portions of the Commission’s EEO rules and policies governing parttime employment are constitutionally offensive. Consequently, while the Commission was obliged to, and twice did correct its rules to satisfy constitutional concerns, the Commission lacks authority to refuse to apply its EEO rules to parttime television and cable employment.

^{4/} Additional authority for maintenance of all constitutional portions of the original EEO regulations is found in Section 634 of the Act, which codifies portions of the Cable Act of 1984. See 2000 EEO R&O, 15 FCC Rcd at 2339-41 ¶¶28-30.

That being the case, the Commission should also continue to apply its rules to parttime radio employment. It would make no sense to offer less EEO protection in radio than in television, given that these two industries are regarded by the Commission as close cousins in the services they provide and the communications needs they satisfy.^{5/}

Indeed, even had Congress not acted to lock in the constitutional portions of the television EEO rules as they stood in 1992, it would still be impossible to justify the exclusion of parttime positions from EEO protection. As the Second Circuit declared in 1977, when it rejected a Commission decision exempting stations with fewer than fifteen employees from the EEO rules, “[t]he Commission does not argue, nor could it, that the need for equal employment opportunity has become less urgent” since the EEO rules were adopted. Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) (“UCC III”).^{6/}

^{4/} Additional authority for maintenance of all constitutional portions of the original EEO regulations is found in Section 634 of the Act, which codifies portions of the Cable Act of 1984. See 2000 EEO R&O, 15 FCC Rcd at 2339-41 ¶¶28-30.

^{5/} See Review of the Commission’s Broadcast Ownership Rules (NPRM), 17 FCC Rcd 18503, 18536-37 ¶102 (2002) (discussing radio/TV crossownership).

^{6/} The only theory given in the Third NPRM for the potential denial of EEO protection for parttime workers is “burdensomeness.” Yet EEO protection for parttime workers has never been regarded as “burdensome” before. We note that bare claim of “burdensomeness”, even when combined with other purported justifications (e.g. limited FCC resources, unreliability of statistical reports by licensees, continued protection of other workers) was insufficient in 1977 to justify the denial of EEO protection for a large number of positions in the broadcasting industry. See UCC III, 560 F.2d at 533. Depriving parttime workers of EEO coverage on “burdensomeness” grounds would be even less justifiable.

In adopting the new EEO regulations, each commissioner evidently appreciated that there is a long way to go before equal employment opportunity is achieved.^{7/} There would be no logical way to reconcile these declarations of principle and truth with the denial of EEO protections long enjoyed by parttime workers.

Finally, to the best of our knowledge, no federal or state civil rights statute affecting employment opportunity omits coverage of parttime employment. The FCC should avoid becoming the nation's only agency with EEO enforcement responsibilities to deny those seeking parttime employment the full protection of its civil rights rules and policies.

III. The Extent Of Parttime Employment

In 1986, of 206,135 total broadcast employees, 35,368, or more than 17%, were parttime. 1987 EEO R&O, 2 FCC Rcd at 3970 ¶21. Unfortunately, this appears to be the most recent available aggregate FCC data on parttime employment.^{8/} AFTRA, one of the

^{7/} 2000 EEO R&O at 110 (Separate Statement of Chairman Michael K. Powell) (“[t]he public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list”); id. at 111 (Separate Statement of Commissioner Kathleen Q. Abernathy (“[it] would be irresponsible to place in jeopardy rules that can have a significant impact on the media opportunities available to all members of our communities”); id. at 112 (Separate Statement of Commissioner Kevin J. Martin (“[a] more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition”); id. at 113 (Separate Statement of Commissioner Michael J. Copps) (“[t]his is not an area in which we can afford to be timid, because there is nothing less than civil rights at stake.”))

^{8/} It would be useful if the Commission would place, in the record, data by job type, race, gender, and fulltime or parttime status. This data can be derived from the data tapes that contain the 1997 and 2000 Form 395 filings.

EEO Supporters, has extensive information on this subject. Its National Director of News and Broadcast, Thomas Carpenter, states as follows in a declaration provided as Annex 2 hereto:

In the course of negotiating AFTRA's collective bargaining agreements with broadcast employers, AFTRA has observed a marked rise in part-time employment. In some sectors of the industry, part-time employment is becoming the rule, rather than the exception.

For example, at AFTRA stations in the Los Angeles market, full-time broadcasters are only 56% of the total workforce, with part-timers at 31% and daily hires (per diems) at 13%. While ABC full-time broadcasters at AFTRA stations represent 59% of their workforce, and CBS full-timers at AFTRA-represented shop represent 58% of on-air employees, Clear Channel AM/FM full-time broadcasters, employed pursuant to AFTRA collective bargaining agreements, number only 54% while AFTRA Westwood One full-time broadcasters have decreased to only 46%. In the New York market, part-time broadcasters number 38% of their workforce, with several FM and AM stations employing a majority of employees on a part-time basis (WQHT-FM, WRKS-FM, WQCD-FM and WFAN-AM).

In the Boston market, part-time AFTRA broadcasters have increased to 42% of their workforce. And at an NBC owned and operated station in Hartford, the station has been hiring reporters as freelance employees, but often using them past a 40 hour week. In Philadelphia, per diems work as many as 40 hours per week at the NBC station. And at Seattle's KIRO radio, there has been an increase in part-time employees during the past 5 years from 25% to 33%.

Parttime jobs are even more essential to broadcast operations today than they were before the 1996 Act. Industry consolidation has led to a wave of cost-cutting aimed at promoting efficiency. Parttime employment is attractive to efficiency-minded employers because the performance of many job functions does not require 40 hours in a week. Hiring and training a person to perform the functions required for each of two 20-hour jobs is usually more expensive than hiring two specialists, one for each of two 20-hour jobs. This cost saving is enhanced by the economics of parttime labor: a parttime worker typically commands a lower hourly wage

and receives fewer benefits than a fulltime worker. Furthermore, there is less financial exposure to the business if a parttime employee fails to perform as expected. Thus, many broadcast companies have found it attractive to structure their operations to accommodate greater proportions of parttime workers.^{9/}

Parttime employment is especially commonplace for positions in news. In 2001, parttime employees were 31% of radio news staffs and 13% of TV news staffs. Comments of NOW et al. in Response to the Second NPRM, p. 9 and n. 38 (citing the RTNDA/Ball State University 2000 News & Staffing Survey (2001)).^{10/} Parttime employment is also commonplace for audio engineering, and for shift positions such as announcers, producers assigned to particular announcers or shifts, and weekly public affairs program hosts and producers. These positions are closely tied to one of the key original objectives of the EEO rules -- promoting diversity of viewpoints.

^{9/} Thomas Carpenter of AFTRA states that “[o]ne example of increasing duties during a decreasing work schedule is taking place at Clear Channel radio stations where broadcasters are often employed as ‘voice-trackers’, rather than live-radio announcers. These employees record the announcements, liners and tags for an entire air shift in one or two hours. Rather than working an 8 hour day, they may record air shifts for three stations in the course of four hours a day.” Carpenter Statement, Annex 2.

^{10/} See also Statement of Thomas Carpenter (Annex 2), who explains that “reporters at traffic and news reporting services such as Shadow Traffic and Metro Networks often work split shifts, during the morning and afternoon drive times. Many employees at Shadow and Metro work only 1 half of the split shift, because of the client’s requirements. In other cases, the split shifts amount to less than forty hours per week.”

Thus, parttime employment is profoundly consequential, and it is gaining in significance. The Commission acted wisely in deciding to illuminate this subject through the issuance of another notice of proposed rulemaking.

IV. The Significance of Parttime Employment

In 1991, the Commission acknowledged the value of an integrated parttime workforce as a source of candidates for promotion to fulltime jobs. See, e.g., Alabama/Georgia Renewals, 6 FCC Rcd 5968, 5972 ¶34 (1991) (criticizing station's failure to promote parttime minority employees to fulltime positions). Three years later, the Commission recognized that "the total number of employees, whether full-time or part-time, may play an important role in assessing an entity's overall employment profile." Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6315 (1994). While individualized assessments of employment profiles are no longer performed, industrywide assessments of employment profiles continue to have value in discerning the effectiveness of any permutation of EEO regulations. Thus, it is fair to say that parttime employment is important in assessing the industry's overall employment profile, which, in turn, is a useful barometer that helps measure the extent to which the rules have helped eliminate and prevent discriminatory practices.

New and relatively new entrants have always predominated in parttime jobs. Most newcomers to the business, especially recent college graduates, are competent to perform one job function, but they often lack the skills to perform in each of multiple job

functions that cumulatively represent 40 hours of work per week. Moreover, single parents with children, particularly women, are often compelled by the exigencies of child care to work parttime, irrespective of their skills and abilities.

Owing to the past history of discrimination in the electronic mass media, minorities and women are disproportionately represented among new entrants. See Comments of EEO Supporters in response to the Second NPRM, pp. 22-24 and 35-53. Thus, minorities and women tend to look to parttime employment as a window of entry opportunity. See Statement of Thomas Carpenter, AFTRA National Director of News and Broadcast (Annex 2) (“as consolidations and mergers increase, licensees promote economies of scale by hiring increasing numbers of part-time employees. It has been my experience that women and minorities often find part-time positions as a necessary entry into stations as they move into new markets.”)

To a person denied employment opportunity, it is no consolation that she was only seeking a parttime position. Consequently, there is no moral justification for rules that provide access to fulltime jobs while limiting access to parttime jobs.

V. Whether EEO Practices Should Be Observed For Both Fulltime And Parttime Positions

Under the new EEO rules, broad recruitment and recordkeeping are not time consuming. Including parttime positions in the rules would impose on regulatees no new fixed costs and only ministerial marginal costs. Those costs are far outweighed by the benefits to

regulatees, to employees, to potential employees, and to society of applying EEO protections to parttime employment.

The principal costs attendant to EEO compliance are the modest fixed expenses of establishing an EEO recruitment and outreach program, and training those who will implement that program. Operating a well-designed EEO recruitment program requires almost no labor, since notifications are generally done electronically or through a mass mail service. The addition of parttime positions to this recruitment system would require only ministerial additional labor above and beyond that required for recruiting fulltime personnel.

Likewise, verifying that parttime employees were the subject of broad recruitment would also require only slightly more effort than verifying that fulltime positions were the subject of broad recruitment. Once a regulatee constructs a spreadsheet template for verification of recruitment of fulltime positions, little additional work would be entailed in entering the data for parttime positions onto the spreadsheet.

Taken as a whole, then, including parttime employment in the EEO rules would require almost no significant additional work for regulatees. By doing this work, broadcasters and cablecaster will have done their part to protect the ability of new entrants, particularly minorities and women, to compete on equal terms for all vacancies.

VI. The Minimum Number Of Hours For A Parttime Employee

The 1971-1998 and 1999-2000 rules did not specify a lower limit on the number of hours a person would need to work each week to be regarded as a parttime employee. The issue never arose, probably because every employer knows what a parttime employee is. No one puts a one-hour per week worker on the payroll; someone engaged for that short a time is simply made into an independent contractor. Therefore, following longstanding and noncontroversial industry custom, a parttime employee should be defined as a person working enough hours to be put on the payroll but (per the Third NPRM) less than 30 hours per week.

Conclusion

FCC regulatees should get in the habit of extending equal employment opportunity practices to all those they employ or might employ. Apart from the religious exemption and the rare instance of a bona fide occupational qualification (BFOQ), there is neither a moral justification nor a practical reason to exclude any class of jobs, or any class of employees, from the most robust protections of our civil rights laws, rules and policies.

Respectfully submitted,

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December 20, 2002

ANNEX 1

LIST OF EEO SUPPORTERS

Minority Media and Telecommunications Council
Office of Communication of the United Church of Christ, Inc.
African American Media Incubator
Alliance for Community Media
Alliance for Public Technology
American Civil Liberties Union
American Federation of Television and Radio Artists
American Hispanic Owned Radio Association
American Indians in Film
Asian American Journalists Association
Asian American Media Development, Inc.
Black Citizens for a Fair Media
Black College Communication Association
Black Entertainment and Sports Lawyers Association
Black Entertainment and Telecommunications Association
Civil Rights Forum on Communications Policy
Cleveland Talk Radio Consortium
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minorities in Communications Division of the Association for
Education in Journalism and Communications
Minority Business Enterprise Legal Defense and Education Fund
NAMIC, Inc. (National Association of Minorities in Communications)
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association of Hispanic Journalists
National Association of Hispanic Publications
National Bar Association
National Council of Hispanic Organizations
National Council of La Raza
National Council of the Churches of Christ in the United States
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Latino Telecommunications Taskforce
National Newspaper Publishers Association
National Urban League
Native American Journalists Association
Native American Public Telecommunications

Puerto Rican Legal Defense & Education Fund
San Diego Community Broadcasting School, Inc.
Telecommunications Research and Action Center
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

ANNEX 2

STATEMENT OF THOMAS R. CARPENTER

I, Thomas R. Carpenter, am the National Director of News and Broadcast for the American Federation of Television and Radio Artists (AFTRA). This statement is provided for use by the EEO Supporters group of organizations in support of their Comments in response to the FCC's Third Notice of Proposed Rulemaking on the mass media EEO regulations.

In the course of negotiating AFTRA's collective bargaining agreements with broadcast employers, AFTRA has observed a marked rise in part-time employment. In some sectors of the industry, part-time employment is becoming the rule, rather than the exception.

For example, at AFTRA stations in the Los Angeles market, full-time broadcasters are only 56% of the total workforce, with part-timers at 31% and daily hires (per diems) at 13%. While ABC full-time broadcasters at AFTRA stations represent 59% of their workforce, and CBS full-timers at AFTRA-represented shop represent 58% of on-air employees, Clear Channel AM/FM full-time broadcasters, employed pursuant to AFTRA collective bargaining agreements, number only 54% while AFTRA Westwood One full-time broadcasters have decreased to only 46%. In the New York market, part-time broadcasters number 38% of their workforce, with several FM and AM stations employing a majority of employees on a part-time basis (WQHT-FM, WRKS-FM, WQCD-FM and WFAN-AM).

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One example of increasing duties during a decreasing work schedule is taking place at Clear Channel radio stations where broadcasters are often employed as 'voice-trackers', rather than live-radio announcers. These employees record the announcements, liners and tags for an entire air shift in one or two hours. Rather than working an 8 hour day, they may record air shifts for three stations in the course of four hours a day.

Similarly, reporters at traffic and news reporting services such as Shadow Traffic and Metro Networks often work split shifts, during the morning and afternoon drive times. Many employees at Shadow and Metro work only 1 half of the split shift, because of the client's requirements. In other cases, the split shifts amount to less than forty hours per week.

As has been outlined, changing dynamics in the industry have led to significant increases in part-time positions as part of the total workforce at most broadcast stations nationwide. And as consolidations and mergers increase, licensees promote economies of scale by hiring increasing numbers of part-time employees. It has been my experience that women and minorities often find part-time positions as a necessary entry into stations as they move into new markets.

Discrimination on the basis of race, age, gender or another prohibited basis is no less invidious if the discriminatee is employed on a part-time basis, especially when part-time employment is on the rise. Meaningful and enforceable EEO regulations must contemplate that these rules apply to part-time employees, as well.

I declare under penalty of perjury under the laws of the United States of America that the foregoing Statement is true and correct.

Executed _____.

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[Original signed copy on file with EEO Supporters]